Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNITED STATES OF AMERICA,

Respondent,

v.

EARL FRITH,

Petitioner.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the government violate a defendant's right to speedy trial under the Sixth Amendment, even without a need for a showing by the defendant of specific prejudice, where there is a delay of six years between the indictment of the defendant and notice to the defendant of the indictment and the reason for the delay is not related to the diligent prosecution of the defendant but, rather, results from the government's desire to use a person involved in the defendant's case as an undercover informant in another investigation?

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OPINIONS AND ORDERS BELOW

The Petitioner's motion to dismiss the indictment against him on the basis of a violation of his right to speedy trial was granted by the United States District Court for the Western District of Virginia in a post-trial oral decision on February 26, 1998. The transcript of that decision is set out in the Appendix at A-1. The decision of the district court was reversed, and the Petitioner's conviction was affirmed, in an unpublished opinion issued by the United States Court of Appeals on June 14, 1999, which is set out in the Appendix at A-13.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The final judgment of the United States Court of Appeals for the Fourth Circuit was rendered on June 14, 1999.

CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution states in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]

STATEMENT OF THE CASE

Proceedings Below

On May 12, 1991, the Petitioner, Earl Frith, and a number of other codefendants were named in a sealed indictment by a grand jury sitting in the United States District Court for the Western District of Virginia. Frith was not notified of the indictment, but all other codefendants who were located in Western Virginia were notified of the charges and interviewed by the DEA prior to May 12, 1991. Javier Cruz was one of these codefendants. He was arrested in April 1991, and thereafter began cooperating with authorities, first in the United States, and in 1992 under a new identity in an undercover capacity in Colombia, South America. The government obtained a superseding sealed indictment against Frith in January 1997, which charged Frith with the same crimes alleged in the 1991 indictment: (1) conspiracy to possess with the intent to distribute cocaine in violation of 21 U.S.C. § 846, (2) conspiracy to import cocaine in violation of 21 U.S.C. § 963, (3) structuring a currency transaction with a domestic financial institution to evade a reporting requirement in violation of 31 U.S.C. § 5324(3), and (4) money laundering in violation of 18 U.S.C. § 1956(a)(3)(B) and (C). Frith received notice of the indictment in February 1997.

Prior to the scheduled trial in January 1998, Frith moved to dismiss the indictment, alleging that the nearly seven-year period between the initial indictment and the trial violated his right to a speedy trial under the Sixth Amendment to the United States Constitution. The district court did not immediately rule on the motion, but instead elected to wait until after trial to make a decision.

At Frith's trial, the government claimed that Frith, a real estate broker and farmer, who was president of a real estate

company with at least 25 agents and two offices, in Roanoke and Floyd County, Virginia, was a tangential participant in a conspiracy to sell cocaine originating with the Cali Cartel in Colombia. According to the government, starting in 1988 an individual named Leonardo Rivera-Ruiz sold large amounts of cocaine to a variety of individuals in the United States, and in 1990 employed Cruz to transport cocaine from Phoenix and Los Angeles to New York. In 1989, shortly before the time that Cruz began to work for Rivera-Ruiz, Cruz (using the name Luis Florez) posed as the owner of a trucking company and contacted Frith for the purpose of purchasing a residence and a farm in the Floyd County, Virginia, area. After purchasing the farm and residence, Cruz approached Frith about purchasing some cattle. The government alleged that Cruz paid Frith $16,000 in cash for the cattle, and that on August 16, 1989, Frith divided the cash into two separate $8,000 bank deposits in order to avoid federal reporting requirements. In May of 1991, after Cruz and his wife, Pamela, were arrested, the government arranged to have Pamela Cruz make an appointment with Frith and to wear a transmitting device, in an attempt to get Frith to make incriminating statements against himself regarding the $16,000 cash deposit made on August 16, 1989. At the conclusion of the initial meeting, Frith stated to Pamela Cruz that he would call her later that evening concerning listing her current house for sale. When Frith made no contact with Pamela Cruz for approximately two weeks, the government arranged to have Pamela Cruz bring $40,000 to his office, without making an appointment or letting Frith know that she was coming in, and to sit in his office and wait until he arrived. This money was purported to be a downpayment on a new house. The government had no evidence that Frith was involved in the distribution of drugs and did not allege that he had any conspiratorial connection to anyone other than Cruz and his wife.

On these allegations, the jury acquitted Frith of both conspiracy charges and could not reach a verdict on the money-laundering charge. However, Frith was convicted of the charge of structuring the financial transaction in 1989. Following the jury verdict, the court dismissed the indictment, citing the lengthy seven-year delay, together with the presumed prejudice inherent in such a delay, as the basis for its decision.

The government appealed, and the United States Court of Appeals for the Fourth Circuit reversed the ruling of the district court, holding that the district court had misapplied the speedy trial test set out by this Court in *Barker v. Wingo*, 407 U.S. 514 (1972). The Fourth Circuit held that where the government delays a trial of a defendant in order to facilitate the investigation of other persons in other crimes a balancing of the *Barker* factors requires a rejection of the speedy trial claim of the defendant, regardless of the length of the delay, unless the defendant himself can demonstrate significant actual prejudice, and that the district court erred in holding that the presumption of prejudice inherent in the seven-year delay between indictment and trial was enough to support the defendant's speedy trial claim.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS WAS NOT IN CONFORMITY WITH THE SPEEDY TRIAL DECISIONS OF THIS COURT, AND THIS COURT MUST CLARIFY WHETHER THE SPEEDY TRIAL RIGHTS OF A DEFENDANT MAY BE VIOLATED WITHOUT A SHOWING OF ACTUAL PREJUDICE WHEN THE GOVERNMENT DELAYS THE TRIAL OF A DEFENDANT FOR SEVEN YEARS FOR THE PURPOSE OF INVESTIGATING OTHERS.

The Sixth Amendment provides a broad guarantee that an accused defendant in a criminal trial has "the right to a speedy and public trial." As this Court has previously noted, the speedy trial provision is written with such breadth that, if interpreted literally, it could be invoked if the government delayed a criminal trial for any reason. *Doggett v. United States*, 505 U.S. 647, 651 (1992). In an effort to provide guidance for lower courts in the proper application of the speedy trial guarantee, this Court set out a four-part test in *Barker v. Wingo*, 407 U.S. 514 (1972), to assist trial courts in determining whether a defendant's speedy trial rights have been violated in particular circumstances. In *Barker*, the Court ruled that trial courts faced with speedy trial challenges should balance (1) the length of the delay, (2) the reason for the delay, (3) the defendant's assertion of his right, and (4) the prejudice to the defendant. The Court cautioned in *Barker*, however, that these factors were not comprehensive and that other factors could be considered by the trial court as well. *Id.* at 530.

Despite the inherent lack of clarity in such a multi-part balancing test, since *Barker* was decided this Court has heard

few Sixth Amendment speedy trial cases, and only one case, *Doggett*, involved a review of a court's application of the *Barker* factors. In *Doggett*, the Court faced the issue of the interplay between the second and fourth *Barker* factors, the reason for the delay and the prejudice to the defendant. With regard to the reason for delay, the Court noted in *Doggett* that most cases fall in the wide gulf between the easily analyzed cases of the extremes, i.e., cases where the facts showed either diligent prosecution of a defendant by the government or bad-faith delay. In *Doggett*, a case involving an eight-year delay between indictment and arrest caused by the government's negligence in failing to apprehend the defendant in a timely manner, the Court ruled that when the government's negligence causes a lengthy delay between indictment and trial, and "when the presumption of prejudice, albeit unspecified, is neither extenuated . . . nor persuasively rebutted, the defendant is entitled to relief" under the Sixth Amendment. 505 U.S. at 658.

This case presents the same type of lengthy delay, and the same important general issue, as that addressed in *Doggett*, but involves a different reason asserted by the government as justification for the delay, the significance of which this Court has not yet addressed. The cause of the lengthy delay in the present case, as claimed by the government, was not related to the diligent prosecution of the defendant, but rather was the purported need for secrecy to protect an ongoing investigation of other individuals, unrelated to the defendant. According to the government's version of the facts, Frith's alleged complicity with the drug conspiracy involving Cruz was evidenced by (1) the receipt of funds constituting alleged drug proceeds from Cruz in Salem, Virginia, on one occasion in 1989, and the structured deposit of those funds in the bank, and (2) the subsequent acceptance in May 1991 of $40,000 from Cruz's wife as a downpayment on a house in an attempted sting operation following Cruz's arrest. The government asserts that

the 1991 indictment of Frith had to be sealed until February 1997 because Cruz began to work for the DEA as an undercover operative infiltrating the Cali Cartel in Colombia in 1992, and remained there until February 1996. According to the government, release of the indictment prior to 1997 would have risked the disclosure of the fact that Cruz was an informant and would have jeopardized the DEA's investigation in Colombia.

There are several obvious flaws in the government's position that the ongoing investigation of other individuals could justify a six-year delay between indictment and notification to Frith of the indictment. First, as a factual matter, the government's position that the delay in Frith's trial was necessary cannot withstand close scrutiny as the facts reveal that Cruz was operating in Colombia under a false identity, completely separate from his other false identity as Florez when he dealt with Frith in 1991. The government has never demonstrated any reason to support the belief that anyone involved in the Cali Cartel could trace Cruz, or jeopardize the government's investigation, from any evidence presented in Salem, Virginia, regarding Frith's alleged crimes. Moreover, Cruz was not an important government witness against Frith, for he did not even testify against Frith in the 1998 trial. There is thus no basis to believe that Cruz would have testified at a trial of Frith in 1991 or 1992. In short, the alleged tie between Frith and the investigation of the Cali Cartel in Colombia, South America, was so tenuous and weak, and the risks of any disclosure from Frith's indictment were so inconsequential and remote, that it was not reasonable for the government to delay Frith's trial for so long out of fears of such disclosures.

Second, although the 1991 indictment was sealed as to Frith, other persons named in the indictment were notified of the pending charges and were given a chance to tell their side of the story to the DEA. In fact, Frith was the only person

residing in the Western Virginia area who was not notified of the charges against him and was not given an opportunity to tell his version of the events to government agents or to have counsel begin preparing his defense.

Apart from these serious factual flaws in the government's position, there is a third, and more significant for this Petition, reason why the position of the government and the Fourth Circuit cannot be allowed to stand. Even if one accepts at face value the government's claims that it feared exposure of Cruz in Colombia if Frith's indictment was unsealed and Frith was tried, the balancing of the *Barker* factors nevertheless compelled the conclusion—properly reached by the district court—that Frith's right to a speedy trial was violated.

Although the Fourth Circuit characterized the district court ruling as a "misunderstanding" of the holding of *Doggett* and *Barker*, and held that the district court had clearly erred in finding a violation of Frith's speedy trial rights because of its misunderstanding of the proper legal test, in actuality the Fourth Circuit erred in construing this Court's decision in *Doggett* to mandate the holding that any speedy trial claim, however long the delay, must be denied where the government's reason for delay was the investigation of others and the defendant could not prove actual prejudice.

The district court holding was plainly a decision in conformity with *Doggett* and was a reflection of the court's determination that while the government's reason for delay in prosecuting Frith may have been a good one, and was not motivated by bad faith, it was still a type of reason for delay which, as with the government's negligence in *Doggett*, could not overcome the presumption of prejudice inherent in such a very long delay before trial. There is no question that at the hearing for post-trial motions the district court discussed the

four *Barker* factors properly (Post-Trial Motions Hearing at 27-28, App. at A-1), and the government conceded after the discussion of the *Barker* speedy trial test that "[t]he court's analysis is exactly right. I don't think there's much in the way of legal argument to add to what the court has already said." (Post-Trial Hearing at 32-33; App. at A-6.) The transcript of the speedy trial hearing clearly shows that the district court was most concerned with two factors: the sheer length of the delay of Frith's trial and the prejudice inherent after such a lapse of time. The district court plainly weighed the four *Barker* factors and came to the conclusion that (1) the length of delay was entitled to the greatest weight, (2) the cause for delay was legitimate and was entitled to some weight but not as much as the factor of the length of the delay, and (3) the court could not precisely quantify the nature of the prejudice suffered by Frith. Significantly, although finding that Frith himself had not demonstrated concretely that he had suffered more than "minimum prejudice," the district court further found that given the nature of the delay and the cause of the delay "prejudice is presumed over that long a period of time[.]" (Tr. at 39; App. at A-11.) In essence, the district court was applying this Court's pronouncement that the longer the delay in a speedy trial case the more weight will be given to the length of delay and the harder it will be to show good cause.

In its opinion below, the Fourth Circuit itself actually misstated the holding in *Doggett*, thus demonstrating the need for review by this Court. In concluding that *Doggett* mandated the reversal of the district court, the court of appeals stated that this Court has held: "[W]hen delay is justified by a legitimate governmental purpose, such as the need to obtain a missing witness, a speedy trial claim will fail absent a demonstration of actual prejudice." (Opinion at 7, App. at A-21 (citing *Doggett*, 505 U.S. at 656).) This Court never reached such a broad conclusion in *Doggett*, however. In fact, the Court stated in *Doggett* only that some pretrial delay may be inevitable and

wholly justifiable, and it listed several situations in which pretrial delay would be accepted: "[T]he government may need time to collect witnesses against the accused, oppose his pretrial motions, or, if he goes into hiding, track him down." 505 U.S. at 656. Significantly, all of these situations involved governmental activity *relating to the defendant's prosecution*. The only statement in *Doggett* which could possibly have led the Fourth Circuit to its conclusion that all legitimate government actions excuse any delay in trial was this Court's statement that "if the Government had pursued Doggett with reasonable diligence from his indictment to his arrest, his speedy trial claim would fail." *Id.* However, the government has conceded that the cause of the delay in this case had nothing to do with the pursuit or diligent prosecution of Frith but, rather, was due to the government's desire to apprehend and prosecute others in crimes with, at best, tangential relation to the accusations against Frith.

In short, the court of appeals simply assumed that *any* legitimate governmental purpose, including a purpose unrelated to the prosecution of the defendant, would automatically preclude speedy trial relief, regardless of the length of delay, unless the defendant could provide concrete proof of prejudice. Such a legal principle is not supported by this Court's rulings in *Barker* or *Doggett*, each of which recognized the inherent difficulties in proving prejudice in cases involving long delays, and was not followed by the district court.

With regard to the prejudice caused by unreasonable delay between formal accusation and trial, this Court has identified the possibility that the accused's defense will be impaired is "the most serious . . . because the inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Barker*, 407 U.S. at 532. The Court has described the impairment of one's defense as the most difficult form of speedy trial prejudice to prove because time's erosion

of exculpatory evidence and testimony "can rarely be shown." *Id.* It has thus been noted by the Court that "we generally have to recognize that excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify." *Doggett*, 505 U.S. at 655.

The facts of this case underscore the manner in which delay can render it difficult to mount an effective defense. Frith's defense was hampered by the fact that following the time he was said to have structured the bank deposits to avoid reporting requirements he underwent heart bypass surgery and suffered memory loss from a head injury received in an automobile accident. Also, Frith's long-time companion, Jackie Smith, suffered a stroke which affected her memory. Moreover, during the time between the indictment and the unsealing of the indictment, Frith's business changed offices several times. According, as Frith testified, he no longer had his relevant financial records from 1989, including his cattle records, daily call reports, checking accounts, and daytimer, which could have helped him reconstruct the events of August 16, 1989.

Under this Court's precedents, a six-year delay between indictment and notice to the defendant creates prejudice that cannot be quantified, and the Fourth Circuit erred in construing the *Barker* and *Doggett* cases to require denial of a speedy trial claim unless evidence of actual prejudice could be introduced. This Court has not yet addressed whether such a protracted time period for an investigation unrelated to the defendant can justify the failure to afford a defendant his right to a speedy trial. For this reason, and to clarify the application of the ambiguous speedy trial test of *Barker* in those situations in which the cause of the government's delay is laudable but unrelated to the defendant's prosecution, this Court must agree to hear this case.

CONCLUSION

For all of the foregoing reasons, the Petitioner, Earl Frith, requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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DISTRICT COURT RULING

THE COURT: As I understand it, your motion really involves the Sixth Amendment to the Constitution to the effect that an accused enjoys the right to a speedy trial. Now, he was indicted in '91. He was tried in '98. And generally, as I understand it, you know, if you can look with suspicion—if there's more than a year between the date of the indictment return and the trial. And then, you know, if that is triggered and if it has been an unusually long delay, then the next thing you look at is the reason for the delay. Okay. Now, we know what the reason was here. The Government was continuing its investigation not as to Mr. Frith, but as to other members of the conspiracy and so forth.

So it wasn't a negligent delay. It was an intentional delay. But the reason for the delay was a good reason.

MR. WALKER: Up till 1994 under the Government's evidence, Your Honor. I didn't hear any evidence that any activity—

THE COURT: And then, I mean, once we look at the reason, then we look, as I understand it, to the defendant's assertion of his rights. So if he knew he was indicted, I think it was incumbent upon him or his lawyers to ask that his case come to trial if it was being delayed.

Now, if he didn't know he had been indicted and had no reason to suspect that he had been indicted he couldn't come in and ask for a trial when he didn't know he was accused.

And then the fourth element, as I understand they would consider, is, you know, the prejudice to the defendant. And this long a delay I think prejudiced is presumed.

But I think you are out if his attorney knew about the indictment. If his attorney didn't know anything about it and, you know, it went on from '91 to '98 or '97 when he found out about it, I think you've got a right strong case.

MR. WALKER: Well, Your Honor, he's testified under oath. And if you want to call a short recess, I will see who I can get over here. I've gone through the attorney's file and there is nothing in there that indicates that he was going to be indicted. There is something in there—

THE COURT: Well, let's see what counsel for the Government has to say about it.

MR. WALKER: Well, Your Honor, I'd also like to add in this case I think we've shown actual prejudice. All the things that we have shown aside like the lost records—

THE COURT: Well, when prejudice is presumed I think then the burden is on the Government to show that he hasn't been prejudiced. And he has told us that he's been prejudiced, that the length of time he can't—And I can understand all of that. He wouldn't remember whether he took the deposit down or not. And then, you know, I didn't like his getting on and saying, well, I didn't make the deposit then.

MR. WALKER: I didn't like it either, Your Honor. And that's where—

THE COURT: And I don't think he was being truthful because he didn't know.

MR. WALKER: I think he testified—

THE COURT: And I don't have any sympathy for him because of the way he has acted and so forth, you

know, and stretched the truth. But he has the Sixth Amendment behind him that says if he's accused of a crime he enjoys the right to a speedy trial. And he was indicted in '91 and tried in '98 and that's seven (7) years.

MR. WALKER: Your Honor, let me just add this. I have tried hundreds of jury trial both in state and federal court.

THE COURT: I know it.

MR. WALKER: And I have never—I don't recall—better say don't recall because some of them are twenty (20) years ago. But I don't recall ever telling a jury one thing in opening statement and then having to get up and tell them something different halfway through the trial. And that's what happened in this case and I think part of the reason Mr. Frith has difficulty is he doesn't even trust his own memory.

THE COURT: Well, he picked up and saw the deposit slip and maybe the secretary or somebody had made it out and then he said, well, if I didn't make out the deposit slip, then I didn't make the deposit. And that's just—

MR. WALKER: Judge, I will vouch the record—I will vouch the record that he did not see the deposit slip. What he said was that caused me to ask him additional questions and caused him to look at—

THE COURT: He saw the deposit slips, you said, the night before he testified.

MR. WALKER: Yes, Sir. But at the time before he saw the deposit slips he did not have an independent memory of making the deposits.

THE COURT: But he had a memory at the time that Mrs. Cruz came in his office shortly after it happened and he said I made the two (2) eight thousand dollar ($8,000.00)—

MR. WALKER: That's exactly right, Your Honor. And it was listening to those tapes in '97 when he got them before I represented him in May of 1997, when he heard himself say this he believed just like the court did that he must have made the deposits. That's where he—

THE COURT: Why would he have said it in the tape if he hadn't made them? How would he have known about it if he hadn't made it?

MR. WALKER: Your Honor, he testified that he went back through and checked all the transactions—

THE COURT: I think he played loose with the truth on the stand. I think he did. But that isn't going to keep the that doesn't take away his Sixth Amendment right if he's been prejudiced by it. And I think it depends on one (1) thing and that is whether or not his attorneys were advised that he had been indicted or was going to be indicted.

MR. WALKER: And I've told you he's testified—

THE COURT: And then it's incumbent upon him, as I understand it, to ask for a speedy trial if the Government was delaying.

MR. WALKER: And I think the court knows the attorneys involved—

THE COURT: There's no bad purpose on the Government's part. The Government didn't delay it to take advantage of Mr. Frith. I'm convinced of that.

MR. WALKER: I'm convinced of it, also.

THE COURT: They were trying to catch some big drug dealers.

MR. WALKER: I'm convinced of it, also.

THE COURT: And that was the reason. So it was a noble purpose, but it may have violated his Sixth Amendment right to a speedy trial.

MR. WALKER: And I would suggest, Judge, if you look at the quality attorneys he had then, Mr. Thompson and Douthat of Woods, Rogers, that had they known that he was indicted they would certainly have done something. They wouldn't have just sat on their hands. But we had—And if the court wants to call a recess, I'll see if I can get one of them to—

THE COURT: Well, let's see what the U. S. Attorney says. Maybe he's going to agree with you that we ought to dismiss the charge.

MR. PAGAL: Well, Your Honor, I can't really do that right now. I'm going to let Mr. Walker let me talk for a second. The delay was long. I mean, it—

THE COURT: It was.

MR. PAGAL: It would be foolish to—

THE COURT: It was almost as long as the delay that, you know, the eight and a half (8½) years or something in the Doggett case.

MR PAGAL: A two (2) year difference between Doggett, that case and this case.

THE COURT: Right. But it was way over a year, so it was long enough to trigger the presumption I think of, you know, prejudice.

MR. PAGAL: Indeed.

THE COURT: Right.

MR. PAGAL: And everyone concedes that as well. The court's analysis is exactly right. I don't think there's much in the way of legal argument to add to what the court has already said.

THE COURT: And he wasn't incarcerated. One of the things they look at, you know, if the Government throws you in jail and keeps you over there for years and then brings—That didn't happen in this case. He wasn't arrested and he wasn't bothered. And the Government, you know, wasn't negligent in anything it did. It was trying—And it went about I think the only way that it has to catch big operators.

MR. PAGAL: Well, we would submit that that's correct, Your Honor. We agree with that analysis. We would only emphasize two (2) things. One (1), the balancing test that the court has already described. In that balancing test we would ask the court to place a lot of weight on the reason for the delay, that we needed to keep the indictment sealed. Well, of course, we had to seal it in the first instance and then we had to keep it sealed in order to conduct this investigation.

And secondly, we would also ask the court to consider in terms of the prejudice element of the analysis that there really wasn't much prejudice despite the passage of time to Mr.

Frith. The documents that Mr. Walker has gone on and on about that Mr. Frith claims to be missing, documents related to how many cows he sold and ear tag records and all that have nothing to do with this case.

THE COURT: It doesn't.

MR. PAGAL: So in that sense there is no prejudice. Mr. Frith's memory may indeed be—

THE COURT: And he says some of the people that would have known about it have died in the meantime.

MR. PAGAL: And all that may well be true, Your Honor. But it's unlikely that they would have had anything to have added to the evidence in this case. And as to Mr. Frith's memory, diminished memories cut both ways. Sometimes it helps the Government and sometimes it hurts the Government and the like. But in any event—

THE COURT: I don't think it was any delay on the part of the Government to prejudice him in any way. That wasn't the reason for the delay and I so find.

MR. PAGAL: I would submit that Mr. Frith gave a good account of himself on the stand, showing little evidence that his memory was all that impaired even despite the passage of time. Records that might have been pertinent that Mr. Walker has identified, I think he has had to concede that the Government has turned over. Those that helped his client or hurt his client were turned over as a matter of fact. So we would take the position that you balance the need for the continuing investigation and a need to keep the indictment sealed against what little prejudice actually occurred and that in that balance the court would find that there's been no Sixth Amendment violation and the conviction ought to stand.

The Doggett case, as the court has pointed out, is really an opposite to these facts. There is no negligence here.

THE COURT: There was negligence on the part of the Government—

MR. PAGAL: In the Doggett case, but not here.

THE COURT: But we use the same test I think. We apply the same test.

MR. PAGAL: I agree. I concede that. What I can tell the court, either I can make a proffer or I can put Mr. Mott on the stand since I wasn't here back in '91 and before that, the Government's position would be as follows, that at the time that Mr.—or shortly following the time that Mr. Frith's offices were searched and he had the meeting or the contact by Agent White that he retained counsel, Mr. Thompson being the lawyer that I think the Government dealt with. He retained counsel. There was a sequence of meetings involving Agent White. There was at least one (1) telephone conversation with Mr. Mott. This is the United States Attorney Joe Mott. In which the fact that Mr. Frith was subject to an investigation, the charges that he would be subject to were discussed. I concede that it is unlikely—we don't have definitive evidence one way or another—but it is unlikely that he knew there was an indictment. It was sealed after all and there would have been little to be gained—

THE COURT: Well, I think if his attorneys or either one of them knew it, then notice to them would be notice to him, I believe.

MR. WALKER: I think he's saying it's unlikely that his attorneys would have been notified that there was an

indictment because it was sealed. I believe that's what he's saying.

MR. PAGAL: That's correct, Your Honor. I can't say and I don't think Mr. Mott can say—although I'll be happy to put him on the stand—that either Mr. Frith personally or his lawyers were told that there was an indictment pending against him, but rather that there were charges and that he was the subject of an investigation. But I don't think the Government can take the position here in good faith that anybody on behalf of Mr. Frith or Mr. Frith personally was explicitly told there is an indictment pending. It was, after all, under seal and it was sealed for a purpose.

Again, I would be happy to put Mr. Mott on the stand or Mr. Mott perhaps can proffer himself more explicitly. But that would be the Government's position on that part of the analysis.

MR. WALKER: And Your Honor, we would agree that the attorneys were told that there was an investigation. We would also agree that—

THE COURT: They knew that there was an investigation.

MR. WALKER: That there was an investigation. We would also agree they were never told about the indictment. They were never told that he was specifically charged. And that after a period of time, based on their experience and actually my experience and probably every other attorney's experience around here, after a certain period of time goes by and your client is under investigation and nothing has happened, this is such an unusual situation that you assume that it's gone. You know, he was under investigation, but they decided not to indict him.

I take issue with Mr. Pagal on the issue of whether or not Mr. Frith was actually prejudiced. When you have an accident that impairs your memory to a degree, then you're automatically prejudiced to some extent. But the question the court keeps asking is the question Mr. Frith is unable to answer which is, when you talked to Pamela Cruz why did you say these things. What was going through your mind to make you say these things? He does not have a memory of 1991.

THE COURT: No, but there he knows—You can look at the transcript and know what he said, told her then. And if he hadn't made the deposits or had someone make them for him and told him what to do, he wouldn't have remembered that. And he said on the tape something to this effect, you can count on me. I'm not turning you in or anything. What I did in that case was make two (2) deposits, he said, of eight thousand (8,000) each and that's what was made. And he says that in the transcript and this was soon after it happened.

The thing that I got irritated at him about was getting on the stand then and not telling the truth. But that still doesn't—You can tell all the untruths you want and you're still protected by your Sixth Amendment right.

MR. WALKER: Your Honor, I don't want to belabor this point—

THE COURT: And you're going to win. What I'm going to do is dismiss both counts of the indictment in so far as they pertain to him on the basis that his Sixth Amendment rights have been infringed.

MR. WALKER: Thank you.

THE COURT: Now, the reason I didn't do it earlier, I wanted it to go to trial. I didn't grant the motion for a

judgment of acquittal. So the Government is in a good position to appeal the case and I wouldn't be surprised if the Fourth Circuit doesn't say the trial judge was wrong and sends it back and directs me to sentence him which I'll be glad to do. But it just seems to me that this long delay violated his Sixth Amendment right to a speedy trial and I'm going to dismiss both counts of the indictment in so far as they pertain to Mr. Frith.

MR. WALKER: Your Honor, thank you very much.

THE COURT: Okay.

MR. WALKER: Do you also find that because of the long delay that there were that his defense was prejudiced?

THE COURT: I find that there was minimum prejudice to him. I don't think there was much prejudice because—I don't think there was much prejudice. But I think a person doesn't have to wait that long to be tried whether there's any prejudice or not really. Prejudice is presumed over that long a period of time and so the Government's in good shape and I want the Government to appeal the case. And as I say, I wouldn't at all be surprised if the Fourth—if a panel of the Fourth Circuit doesn't say his Constitutional right has not been violated and sends it back for sentencing. And if it does we'll call him in and sentence him.

MR. WALKER: Well, Your Honor, if that happens we'll probably petition the United States Supreme Court.

MR. PAGAL: Your Honor, we just have one (1) request.

THE COURT: Yes.

MR. PAGAL: Could you adopt your observations, the rest of your observations as finding in this case regarding—

THE COURT: What I have said are the court's findings on the record.

MR. PAGAL: Very well. Thank you, Your Honor.

THE COURT: Right. And I say once again, I think if he has suffered any prejudice, it was minimal. But it's been a long time and you just ought not to commit a crime and the Government know about it and indict you and not tell you about it for that long a period of time before you are tried. I find no fault on the part of the Government. I think the Government's reason for the long delay was, I'll even say noble because they were trying to catch some big drug operators. And as I say, I wouldn't be surprised at all if the Court of Appeals doesn't send it back and direct the court to sentence him. But I don't know what they'll do. But I do want the Government to appeal the case.

Any other matter to come before the court at this time?

MR. WALKER: No, Your Honor.

THE COURT: If not, I'll ask the Marshal to declare a short recess and then we'll take up the next matter.

(PROCEEDING IS CONCLUDED)

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v. No. 98-4246

EARL FRITH, a/k/a F. Earl Frith,
Defendant-Appellee.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v. No. 98-4591

JULIO ROBERTO CASTELLANOS, a/k/a J.R.,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v. No. 98-4653

JULIO ROBERTO CASTELLANOS, a/k/a J.R.,
Defendant-Appellee.

Appeals from the United States District Court
for the Western District of Virginia, at Roanoke.
James C. Turk, District Judge.
(CR-91-82-R)

Argued: May 6, 1999

Decided: June 14, 1999

Before WIDENER, ERVIN, and WILKINS, Circuit Judges.

Affirmed in part, reversed in part, and remanded by unpublished per curiam opinion.

COUNSEL

ARGUED: Thomas Ernest Booth, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. David Dennis Walker, DAVID C. WALKER, P.C., Salem, Virginia; Joaquin N. Fernandez, Coconut Grove, Florida, for Appellees. **ON BRIEF:** Robert P. Crouch, Jr., United States Attorney, Joseph W. H. Mott, Assistant United States Attorney, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

The United States appeals an order of the district court dismissing the indictment against Earl Frith on the basis that a seven-year delay between indictment and trial violated Frith's Sixth Amendment right to a speedy trial. Additionally, the Government appeals the sentence imposed on Frith's codefendant, Julio Roberto Castellanos, arguing that the district court erred in awarding Castellanos a downward adjustment for acceptance of responsibility. *See U.S. Sentencing Guidelines Manual* § 3E1.1 (1997). Castellanos cross appeals, raising several challenges to his convictions and sentence. For the reasons that follow, we reverse the dismissal of the indictment against Frith. And, although we affirm Castellanos' convictions, we vacate his sentence and remand for resentencing.

I.

The facts, viewed in the light most favorable to the Government, are as follows. Beginning in the fall of 1988, Leonardo Rivera-Ruiz began importing and selling cocaine for the Cali Cartel, a narcotics syndicate based in Colombia, South America. The drugs were transported to the United States in large quantities, and Rivera-Ruiz sold them in New York and Philadelphia. Approximately a year later, Rivera-Ruiz decided to retire from the drug trade and disbanded his distribution operations. Shortly thereafter, a member of the Cartel persuaded him to sell additional cocaine. Lacking an outlet for the drugs, Rivera-Ruiz contacted Castellanos, who agreed to sell the narcotics in Houston. Attempts to deliver the proceeds

of the sale of the cocaine to the Cartel were foiled by federal agents, who seized large sums of money from couriers. In order to satisfy the resulting debt to the Cartel, Rivera-Ruiz returned to the business of selling cocaine with Castellanos as a partner. At that point–in the fall of 1990–Rivera-Ruiz employed Javier Cruz to transport cocaine from Phoenix and Los Angeles to New York for sale.

At approximately the same time as he began working for Rivera-Ruiz, Cruz moved to Salem, Virginia and opened a used automobile dealership. He contacted Frith, a local real estate agent, about purchasing a dairy farm. In addition to purchasing the property, Cruz bought 30 head of cattle, on which he made a cash deposit of $16,000 in drug proceeds. Frith structured the deposit of the money in order to avoid federal reporting requirements, dividing it into two deposits of $8,000 and making each at a different branch of his bank.

On May 12, 1991, a sealed indictment was returned naming, *inter alia*, Rivera-Ruiz, Cruz, and Frith. Frith was not aware of the indictment, but Cruz, who had been arrested in April 1991, immediately began cooperating with authorities. In August 1992, the Drug Enforcement Administration sent Cruz to Colombia in an undercover capacity, where he remained until February 1996. After further investigation, the Government obtained a superseding sealed indictment in January 1997, which was unsealed as to Frith the following month. The superseding indictment named 28 defendants, including Castellanos and Frith, both of whom were charged with conspiracy to possess with the intent to distribute cocaine, *see* 21 U.S.C.A. § 846 (West Supp. 1999), and conspiracy to import cocaine, *see* 21 U.S.C.A. § 963 (West Supp. 1999). Additionally, Frith was charged with structuring a currency

transaction with a domestic financial institution to evade a reporting requirement, *see* 31 U.S.C. § 5324(3) (1988), and money laundering, *see* 18 U.S.C. § 1956(a)(3)(B), (C) (1988 & Supp. III 1992). Trial commenced in January 1998. Castellanos was convicted of both conspiracy counts. Frith was acquitted of the conspiracy charges but was convicted of structuring; the jury was unable to reach a verdict as to the charge of money laundering.

A few days before trial, Frith moved to dismiss the indictment on the basis that the delay following the initial indictment violated his Sixth Amendment speedy trial right. The district court took this motion under advisement and after trial dismissed the indictment. In making this ruling, the court noted that the delay in prosecution was not due to the Government's negligence but rather was a product of its diligent efforts to investigate other members of the conspiracy. Additionally, the court found that any actual prejudice to Frith was minimal at best. Nevertheless, the court concluded that it was required to presume prejudice after such a lengthy delay and dismissed the indictment against Frith.

At sentencing, the district court granted Castellanos a two-level downward adjustment for acceptance of responsibility, *see* U.S.S.G. § 3E1.1, over the Government's objection. The court noted that Castellanos had appeared for trial even though he faced a potential life sentence and was a significant flight risk. The court also stated that it would "never . . . punish anyone for taking a trial" and observed that Castellanos, who did not testify at trial, "didn't get on the stand and lie or . . . [say he] didn't do it." J.A. 1030. It declined, however, to grant Castellanos a two-level reduction pursuant to U.S.S.G. § 2D1.1(b)(6).

II.

We first consider the Government's contention that the district court erred in dismissing the indictment against Frith on the basis that the delay of almost seven years between the initial indictment and trial violated his Sixth Amendment fight to a speedy trial. *See* U.S. Const. amend. VI (guaranteeing an accused "the right to a speedy . . . trial"). The question of whether Frith's constitutional right was violated is a legal one subject to de novo review, although we review the factual findings of the district court for clear error. *See United States v. Brown*, 169 F.3d 344, 348 (6th Cir. 1999); *see also Doggett v. United States*, 505 U.S. 647, 651-58 (1992) (conducting de novo review of Sixth Amendment speedy trial claim); *United States v. Grimmond*, 137 F.3d 823, 827-31 (4th Cir.) (same), *cert. denied*, 119 S. Ct. 124 (1998).

In determining whether a Sixth Amendment speedy trial violation has occurred, a court must balance four considerations: the "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972); *see Doggett*, 505 U.S. at 651. The length-of-delay factor serves two functions in the speedy trial inquiry. First, it operates as a preliminary requirement: It is unnecessary to conduct an analysis of a speedy trial claim unless the defendant first demonstrates "that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay." *Doggett*, 505 U.S. at 651-52 (quoting *Barker*, 407 U.S. at 530). Once this hurdle is overcome, the length of delay is relevant to the remainder of the speedy trial analysis because "the presumption that pretrial delay has prejudiced the accused intensifies over time." *Id.* at 652.

There is no question that the delay in this case is sufficiently long to require further inquiry into whether Frith's Sixth Amendment speedy trial right was violated. *See id.* (concluding that an "extraordinary 8 1/2-year lag between . . . indictment and arrest clearly suffices to trigger the speedy trial enquiry"); *id.* at 652 n.1 (noting that "the lower courts have generally found postaccusation delay 'presumptively prejudicial' at least as it approaches one year"); *Grimmond*, 137 F.3d at 828 (determining that a delay of 35 months satisfied the threshold requirement). Accordingly, we must proceed to an analysis of all of the relevant considerations.

We begin by addressing the reason for the delay. As the Supreme Court has noted, various reasons for a lag between indictment and trial are accorded different weights in the speedy trial analysis. *See Barker*, 407 U.S. at 531. For example, "[a] deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government." *Id.* More neutral reasons, such as governmental negligence or an overcrowded court docket, are still weighed against the Government (because it bears the ultimate responsibility for bringing a defendant to trial), but less heavily. *See id.* Finally, valid reasons, such as the need to obtain a missing witness, are weighed in favor of the Government. *See id.*

Here, the district court found that the Government delayed prosecuting Frith so that it could continue to investigate the wide-ranging conspiracy in which Frith was tangentially involved, a purpose the court termed "noble." J.A. 936. Prosecuting Frith shortly after the return of the original indictment could have jeopardized the ongoing investigation of the Cali Cartel, which involved some of the defendants named

in the indictment. Moreover, Frith does not contend that the Government was dilatory in its investigation of the Cartel or in its pursuit of a superseding indictment once the investigation was concluded. Accordingly, we determine that the reason for the delay should be weighed in favor of the Government.

We next consider whether Frith asserted his right to a speedy trial in a timely fashion. "The defendant's assertion of his speedy trial right . . . is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right." *Barker*, 407 U.S. at 531-32. Of course, a defendant who is unaware that he is under indictment cannot be held to account for failing to assert his right to a speedy trial. *See Doggett*, 505 U.S. at 653-54.

The Government does not dispute that Frith was unaware that he had been indicted in 1991. And, he did not learn that he had been charged until after the superseding indictment was unsealed in late February 1997. Under *Doggett*, Frith is not responsible for failing to assert his speedy trial right during the six years that passed before he became aware that he had been indicted. However, we cannot ignore the fact that Frith waited nearly a year after the unsealing of the superseding indictment to assert his right to a speedy trial. Under the circumstances, we are inclined to give this factor little weight in our analysis.

Lastly, we must consider the prejudice suffered by Frith. The district court found this factor dispositive, reasoning that the seven-year delay between indictment and trial mandated an irrebuttable presumption that Frith had been

prejudiced in his ability to defend against the charges.[1] The court based its ruling on *Doggett*, in which the Supreme Court held that a delay of eight and one-half years between indictment and trial violated the Sixth Amendment despite the defendant's inability to establish actual prejudice. *See id.* at 654-58.

We conclude that the district court misunderstood the holding and rationale of *Doggett*. Although the court was correct that a showing of actual prejudice is not required in all speedy trial cases, *see id.* at 655 (stating that "affirmative proof of particularized prejudice is not essential to every speedy trial claim" because "impairment of one's defense is the most difficult form of speedy trial prejudice to prove"), *Doggett* specifically noted that "presumptive prejudice cannot alone carry a Sixth Amendment claim," but rather must be considered in the context of the other factors, particularly the reason for the delay, *id.* at 656. When delay is justified by a legitimate governmental purpose, such as the need to obtain a missing witness, a speedy trial claim will fail absent a demonstration of actual prejudice. *See id.* In contrast, a lengthy bad faith delay by the Government may "present an overwhelming case for

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[1]The Supreme Court has identified three relevant forms of prejudice in speedy trial cases: "'oppressive pretrial incarceration,' 'anxiety and concern of the accused,' and 'the possibility that the [accused's] defense will be impaired' by dimming memories and loss of exculpatory evidence." *Doggett*, 505 U.S. at 654 (quoting *Barker*, 407 U.S. at 532) (alteration in original). The parties agree that since Frith was not incarcerated prior to trial and was unaware of the indictment for the majority of its pendency, only the third form of prejudice is relevant here. *See id.*

dismissal" even without a showing of actual prejudice. *See Id.* In *Doggett*, the Court concluded that a delay of eight and one-half years caused by the Government's negligence in locating the defendant mandated dismissal "when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, nor persuasively rebutted." *Id.* at 658 (footnote & citation omitted). Thus, *Doggett* did not hold, as the district court apparently believed, that a sufficiently lengthy delay may be dispositive of a speedy trial claim irrespective of the other criteria for evaluating such a claim.

Considering the prejudice factor in light of the reason for the delay as *Doggett* instructs, we conclude that the district court erred in weighing this factor in favor of Frith. Here, unlike in *Doggett*, the delay in bringing Frith to trial was justifiable. Thus, his speedy trial claim can succeed only if he makes a showing of actual prejudice. *See id.* at 656. And, the district court found that the prejudice to Frith resulting from the delay was minimal at best; indeed, the court specifically discredited Frith's trial testimony that he had forgotten the details of the transaction that was the subject of the structuring charge.

In sum, our consideration of the factors relevant to an analysis of a speedy trial claim leads us to conclude that Frith's Sixth Amendment right was not violated by the seven-year delay between indictment and trial. Accordingly, we reverse the dismissal of the indictment against Frith.

III.

The Government next contends that the district court erred in awarding Castellanos a reduction in his offense level

for acceptance of responsibility. *See* U.S.S.G. § 3E1.1. The determination by the district court concerning whether a defendant has accepted responsibility "'is entitled to great deference on review'" and will be overturned only if we conclude that the court committed clear error. *United States v. Dickerson*, 114 F.3d 464, 469 (4th Cir. 1997) (quoting U.S.S.G. § 3E1.1, comment. (n.5)).

We have little difficulty in concluding that the district court clearly erred in finding that Castellanos accepted responsibility for his offense. The district court offered three reasons for awarding the reduction: that Castellanos, who faced a potential life sentence, had voluntarily appeared for trial in spite of being a significant flight risk; that the court would "never . . . punish anyone for taking a trial"; and that Castellanos "didn't get on the stand and lie or . . . [say he] didn't do it." J.A. 1030. None of these justifications provides any support for the factual conclusion that Castellanos accepted responsibility.

The commentary to § 3E1.1 makes clear that the adjustment generally is not available to those, like Castellanos, who contest factual guilt at trial. *See* U.S.S.G. § 3E1.1, comment. (n.2).[2] Furthermore, merely appearing for trial is a

[2]The guideline commentary does provide that "[i]n rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial," as when "a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (*e.g.*, to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct)." *Id.* This narrow exception does not apply here.

far cry from the affirmative acceptance of personal responsibility that is a prerequisite to an adjustment for acceptance of responsibility. *See United States v. Nale*, 101 F.3d 1000, 1005 (4th Cir. 1996) (explaining that "in order to receive a reduction under § 3E1.1 . . . the defendant must prove by a preponderance of the evidence that he has clearly recognized and affirmatively accepted personal responsibility for his criminal conduct"); *see also* U.S.S.G. § 3E1.1(a) (stating that a defendant must "clearly demonstrate[ ] acceptance of responsibility for his offense" in order to receive a two-level reduction). Also, the denial of an adjustment for acceptance of responsibility does not constitute punishment for exercising the right to a trial. *See United States v. Guadagno*, 970 F.2d 214, 225-26 (7th Cir. 1992). Finally, the mere fact that a defendant does not testify–and thus does not testify falsely–at a trial during which he contests his factual guilt does not amount to an acceptance of responsibility. *See United States v. Ivy*, 83 F.3d 1266, 1293-94 (10th Cir. 1996); *see also United States v. Castner*, 50 F.3d 1267, 1279 (4th Cir. 1995) (observing that "[a] defendant . . . is not entitled to a reduction for acceptance of responsibility merely because he did not obstruct the administration of justice during his trial").[3] Accordingly, we

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[3]The district court also noted that Castellanos acknowledged his guilt after the trial. However, post-trial remorse does not generally support a reduction for acceptance of responsibility. *See United States v. Martinez*, 901 F.2d 374, 377-78 (4th Cir. 1990) (affirming denial of adjustment for acceptance of responsibility when defendant did not acknowledge his guilt until four days before sentencing). Moreover, we note that Castellanos' purported acceptance of responsibility consisted of a written statement that simply recited, almost verbatim, the portion of the presentence report

conclude that the district court committed clear error in reducing Castellanos' offense level for acceptance of responsibility.

IV.

On cross appeal, Castellanos contends that the district court erred in refusing to impose a two-level downward adjustment pursuant to U.S.S.G. § 2D1.1(b)(6). The Government concedes, and we agree, that the district court erroneously refused to consider whether this adjustment was appropriate.

Section 2D1.1(b)(6) directs a district court to apply a two-level downward adjustment when "the defendant meets the criteria set forth in subdivisions (1)-(5) of § 5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases) and the offense level . . . is level 26 or greater." The district court refused to grant this adjustment to Castellanos on the basis that the reduction was not available because the guideline range exceeded the statutory mandatory minimum. In so ruling, the court appears to have confused § 2D1.1(b)(6) with U.S.S.G. § 5C1.2, which requires the court to "impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence [ ] if" certain criteria are met. The latter provision applies only when the applicable

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that recounted the offense conduct; another statement in which Castellanos claimed to "fully accept responsibility for [his] conduct," J.A. 1100; and testimony at the sentencing hearing. In both statements and in his testimony, Castellanos consistently attempted to minimize the extent of his participation in the conspiracy.

statutory mandatory minimum exceeds the defendant's guideline range. Section 2D1.1(b)(6), on the other hand, applies whenever a defendant meets the criteria enumerated in § 5C1.2 and his offense level is greater than 25. *See United States v. Leonard*, 157 F.3d 343, 345-46 (5th Cir. 1998) (per curiam). We therefore reverse the ruling of the district court and remand for it to make findings regarding whether Castellanos satisfied the requirements of § 5C1.2.[4]

V.

Because we conclude that the district court erred in conclusively presuming prejudice to Frith as a result of the seven-year delay between indictment and trial, we reverse the dismissal of the indictment as to Frith. We affirm Castellanos' convictions, but reverse the award of a downward adjustment for acceptance of responsibility. We further hold that the

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[4]Castellanos raises several other issues, all of which we have carefully considered and have determined to be without merit. Of these, only his contention that the district court erred in refusing a request of the jury to review the 1991 indictment, which had been admitted into evidence during trial, warrants any discussion. "The transmittal of exhibits to the jury is ordinarily a matter within the discretion of the trial court and will not be reversed in the absence of clear prejudice to the defendant[ ]." *United States v. De Hernandez*, 745 F.2d 1305, 1308 (10th Cir. 1984). Castellanos has not specified any possible harm that may have resulted from the failure of the district to transmit the 1991 indictment to the jury, and our review of the record reveals none. Accordingly, we reject this argument.

district court erred in refusing to consider whether Castellanos was entitled to a two-level reduction under § 2D1.1(b)(6).

Accordingly, we reverse as to Frith. As to Castellanos, we affirm in part, reverse in part, and remand for resentencing.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

IN THE
UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 91-82-R-R
	)	
EARL FRITH	)	

ORDER

For reasons stated in open court it is hereby

ORDERED

that Mr. Frith's Motion to Dismiss Counts Four and Five of the indictment is hereby **GRANTED**; the Court being of the opinion that Frith's right to a speedy trial under the Sixth Amendment was violated by the long delay in notifying him of the indictment and bringing him to trial.

Had the Court not granted the motion to dismiss, the Court would have denied Frith's motion for judgment of acquittal or a new trial, the Court being of the opinion there was no reversible error in the trial and more than sufficient evidence to support the conviction.

Because of the long delay, the jury verdict as to Count Four is hereby **VACATED**, Counts four and five are **DISMISSED**, and Frith is **RELEASED**.

Certified copies of this order shall be mailed to all counsel of record.

Entered: This 27th day of February, 1998.

/s/ James C. Turk
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:

MORGAN E. SCOTT, JR., CLERK
BY: /s/ J. Jones
DEPUTY CLERK